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12 MERITAGE HOMES OF NEVADA, INC. f/k/a  
MTH-HOMES NEVADA, INC.

13 **UNITED STATES DISTRICT COURT**

14 **DISTRICT OF NEVADA**

15 MERITAGE HOMES OF NEVADA, INC., an  
16 Arizona corporation, f/k/a MTH-HOMES  
NEVADA, INC.

Case No.: 2:09-cv-01950-PMP-RJJ

17 Plaintiff,

18 vs.

19 FEDERAL DEPOSIT INSURANCE  
20 CORPORATION, AS RECEIVER FOR  
21 FIRST NATIONAL BANK OF NEVADA,  
22 SUCCESSOR-IN-INTEREST TO FIRST  
NATIONAL BANK OF ARIZONA; and  
INCA CAPITAL FUND 37, LLC, an Arizona  
limited liability company,

**JUDGMENT**

23 Defendants.

24  
25 This Court, having considered Plaintiff Meritage Homes of Nevada, f/k/a MTH-Homes  
26 Nevada, Inc.'s ("Meritage") Application for Default Judgment (#14) against Defendants Federal  
27 Deposit Insurance Corporation, as Receiver for First National Bank of Nevada, successor-in-  
28 interest to First National Bank of Arizona (the "FDIC") and INCA Capital Fund 37, LLC ("Inca

95451.1/43435.042

1 Capital") pursuant to Fed. R. Civ. P. 55(a) for their failure to answer or otherwise respond to  
 2 Meritage's Complaint (#1) in this matter; a Default (#13) having been entered against FDIC and  
 3 Inca Capital for their failure to answer or otherwise defend as to Meritage's Complaint on file  
 4 herein; and for good cause shown, the following findings of fact and judgment are hereby  
 5 entered:

6 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

7 1. Inca Capital was the owner of several lots of real property situated in Clark  
 8 County, Nevada, now commonly known as Mountain's Edge Pod 101 or Watermarke (the  
 9 "Property").

10 2. On or about January 17, 2005, Meritage and Inca Capital entered into an Option  
 11 Agreement wherein Meritage was given an option (the "Option") to purchase lots at the Property.

12 3. First National Bank of Arizona acted as Inca Capital's lender in connection with  
 13 its acquisition and development of the Property.

14 4. On or about January 17, 2005, Meritage and Inca Capital entered into a  
 15 Construction Agreement wherein Meritage agreed to construct improvements on the Property on  
 16 behalf of Inca Capital.

17 5. The Construction Agreement also called for Inca Capital to reimburse Meritage for  
 18 all costs actually expended by Meritage for its performance of the work and other obligations at  
 19 the Property.

20 6. In addition to the parties' execution of the Option Agreement and Construction  
 21 Agreement, Inca Capital and First National Bank of Arizona entered into an Assignment and  
 22 Subordination of Option Agreement (the "Subordination"), through which First National Bank of  
 23 Arizona agreed to satisfy Inca Capital's obligations to Meritage under the Option Agreement and  
 24 the Construction Agreement.

25 7. Meritage and First National Bank of Arizona also executed a Consent to  
 26 Assignment, Subordination and Estoppel Certificate and Agreement (hereinafter the "Consent"),  
 27 wherein Meritage consented to the Assignment as set forth in the Subordination.

28 8. The Consent also outlined First National Bank of Arizona's duty to perform Inca

1 Capital's obligations under the Option Agreement and the Construction Agreement.

2 9. In accordance with the Option Agreement and the Construction Agreement,  
3 Meritage proceeded to exercise its rights under the Option and purchased certain lots at the  
4 Property. However, Meritage had no duty to purchase all or any number of the lots.

5 10. In accordance with the terms of the Construction Agreement, Meritage proceeded  
6 to develop the purchased lots.

7 11. While performing under the terms of the Construction Agreement, Meritage  
8 incurred costs and expenses.

9 12. Meritage submitted draws for reimbursement of such expenses to Inca Capital,  
10 which expenses were required to be reimbursed by Inca Capital to Meritage pursuant to the  
11 Construction Agreement.

12 13. Of the draws for payment that Meritage submitted to Inca Capital, nine of them  
14 were never paid, thereby constituting a default under the terms of the Construction Agreement.

14 15. The total amount of unpaid draw requests owed by Inca Capital to Meritage equals  
16 at least \$469,987.42.

16 17. On June 28, 2008, Meritage sent a letter to Inca Capital and First National Bank of  
18 Arizona, notifying them of the default in payment.

18 19. Pursuant to the Consent, upon Inca Capital's default of the Construction  
20 Agreement, First National Bank of Arizona was then obligated to step in and cure such default.

20 21. Neither Inca Capital nor First National Bank of Arizona cured Inca Capital's  
22 default under the Construction Agreement or the Consent.

22 23. 18. Payment was due to Meritage no later than June 28, 2008.

23 24. Pursuant to the Construction Agreement, interest accrues on all outstanding  
25 amounts at a rate of eighteen percent (18.0%) per annum from the date due until paid in full.

25 26. 20. On or about June 30, 2008, First National Bank of Nevada became the successor-  
27 in-interest to First National Bank of Arizona by merger.

27 28. 21. On or about July 25, 2008, the FDIC was appointed receiver of First National  
29 Bank of Nevada, thereby assuming all assets and liabilities of First National Bank of Nevada,

including the obligation to pay Meritage for the breach of the Construction Agreement and the Consent.

22. Although Meritage continued to hold an interest in the Property, the FDIC failed to deliver notice of its appointment as receiver to Meritage. As such, Meritage had no knowledge of the FDIC's appointment as receiver of the Bank until about December 8, 2008.

23. On January 14, 2009 and pursuant to 12 U.S.C. 1821, *et seq.*, Meritage submitted a Proof of Claim to the FDIC (the "Claim").

24. On July 29, 2009, the FDIC requested an extension of the 180-day determination period under 12 U.S.C. § 1821(d)(5)(A)(i) to January 29, 2010.

25. On August 4, 2009, Meritage agreed to the FDIC's requested extension.

26. On August 13, 2009, the FDIC disallowed Meritage's Claim.

27. Meritage filed its Complaint (#1) in this case on October 8, 2009, within the 60 day deadline to do so pursuant to 12 U.S.C. 1821(d)(6).

28. The FDIC and Inca Capital failed to answer or otherwise respond to the Complaint and on April 22, 2010, the Clerk entered Default (#13) against both the FDIC and Inca Capital.

29. That Meritage is entitled to judgment against the FDIC and Inca Capital, jointly and severally, on Meritage's claims of breach of contract, breach of the covenant of good faith and fair dealing and unjust enrichment.

30. Accordingly, Meritage is entitled to judgment against the FDIC and Inca Capital, jointly and severally, in the amount of \$469,987.42, plus interest from June 28, 2008 at a rate of eighteen percent (18.0%) per annum until all amounts are paid in full.

## JUDGMENT

Based on the foregoing, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Judgment be entered in favor of Meritage and against the FDIC and Inca Capital, jointly and severally, in the principal amount of \$436,357.12;

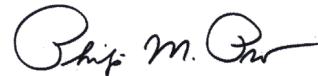
2. That such Judgment in favor of Meritage also include an award of pre-judgment interest against the FDIC and Inca Capital, jointly and severally, in an amount of \$160,101.22, representing pre-judgment interest accruing at a rate of eighteen percent (18.0%) per annum from

1 the date payment was due, June 28, 2008, through July 12, 2010;

2 3. That such Judgment in favor of Meritage also include an award of additional pre-  
3 judgment interest against the FDIC and Inca Capital at a per diem rate of \$215.19 from July 13,  
4 2010 through the date that this Judgment is filed with this Court;

5 4. That the aggregate Judgment of items 1 through 3 above shall bear post-judgment  
6 interest at the contracted rate of eighteen percent (18.0%) per annum, from the date this Judgment  
7 is filed with this Court until fully satisfied, for all of which let execution and garnishment issue  
8 forthwith.

9 DATED: July 20, 2010



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11 PHILLIP M. PRO  
12 United States District Judge

13 Respectfully submitted by:

14 FENNEMORE CRAIG, P.C.

15 By: /s/ Craig S. Newman  
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18 Attorneys for Plaintiff  
19 MERITAGE HOMES OF NEVADA, INC.  
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